Florida Coca-Cola Bottling Company, Inc. *and* Rigoberto Calvo *and* Max Duroseau. Cases 12–CA–16045, 12–CA–16362, and 12–CA–16126

April 24, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

The issues presented for Board review are whether Administrative Law Judge Howard I. Grossman correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing warnings to an employee, withholding his paycheck, and suspending and discharging him, all because of his union sympathies and activities, and that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge or take other unspecified reprisals against employees in retaliation for their union activities, threatening to engage in surveillance of its employees' union activities, and promulgating an overly broad and unlawful rule prohibiting discussion of the Union.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

[1] On November 7, 1995, the judge issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondent's allegations of judicial bias. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence. In particular, we reject the Respondent's contention that the judge improperly denied its request for a continuance so that it could adduce evidence from Supervisor Steven Dechert. At the start of the hearing, the judge advised all the parties that the hearing would be conducted from July 10 through 12, 1995, and the Respondent failed to offer a convincing explanation why it could not make Steven Dechert available to testify during that time. Under these circumstances, the judge's ruling was neither biased nor an abuse of discretion.

[3] The judge made a nonprejudical error in stating that Sales Manager Frank Clifford and Supervisor Kris Kroon were working at a cold vault across the street from the Mobil station when they observed employee Rigoberto Calvo at the fuel pump about noon on June 15, 1994. They were actually working at a cold vault in the Mobil station located across the street from the Respondent's Hollywood facility.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Florida Coca-Cola Bottling Company, Inc., Hollywood, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Maria Kaduk-Perez and *Hector O. Nava, Esqs.*, for the General Counsel.

Ronald G. Ingham, Esq. (Miller & Martin), of Chattanooga, Tennessee, for the Respondent.

David Everett Marko, Esq. (De La O, Marko & Wang), of Miami, Florida, for Charging Party Rigoberto Calvo.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 12–CA–16045 was filed by Rigoberto Calvo (Calvo), an individual, on February 9, 1994,[1] with amended charges on March 25, and on December 22. Calvo filed the original charge in Case 12–CA–16362 on June 30, with an amended charge on July 25.

Max Duroseau (Duroseau), an individual, filed the charge in Case 12–CA–16126 on March 16.

Complaint issued on February 28, 1995. It alleges that Florida Coca-Cola Bottling Company, Inc. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) threatening employees with discharge in retaliation for their support of the United Steelworkers of America, AFL–CIO, CLC (the Union); (2) giving employees the impression that their union activities were under surveillance; (3) impliedly threatening to discharge or take unspecified reprisals against employees in retaliation for their support of the Union; (4) making disparaging comments to employees because of their support of the Union; and (5) promulgating an overly board rule prohibiting employees from discussing the Union during working hours on company property.

The complaint further alleges that Respondent violated Section 8(a)(3) of the Act by taking the following action against Calvo because of his support of the Union and protected concerted activities: (1) issuing warnings to him on March 9 and 14; (2) withholding his paycheck in late April; (3) suspending him on June 30; and (4) discharging him on July 1.

A hearing was held before me on these matters in Miami, Florida, on July 10, 11, and 12, 1995. Thereafter, the General Counsel and the Respondent filed briefs. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Tennessee corporation, with an office and place of business in Hollywood, Florida, where it is engaged in the manufacture and distribution of soft drink products.

[1] All dates are in 1994 unless otherwise specified.

During the 12 months preceding issuance of the complaint, a representative period, Respondent purchased and received at its Hollywood, Florida facility goods and materials valued at in excess of $50,000 directly from suppliers outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Campaign and the Company's Reaction*

The Union began a campaign in late 1993. The Company learned of the campaign, and held a series of management meetings concerning it. Christopher Kroon, a supervisor at the time, testified that he attended a meeting in late December. Service Center Manager Paul Daniel[2] told the assembled supervisors that there was a union movement within the plant, and that there was ''no way in hell that that was going to happen.'' The Company distributed a document entitled ''Early Warning Signals'' of union activity. It details many types of employee conduct from which a supervisor could infer that union activity was taking place.[3] The supervisors were told to keep their ''eyes and ears open for any signs of union activity.'' Several employees, including Calvo, were named specifically. Kroon, a supervisor, interpreted this to mean that whenever a supervisor got the chance, he was to terminate an employee engaged in union activity. Kroon in fact was involved in the sequence of events leading to Calvo's discharge, as related hereinafter.

Richard Bennett, also a former supervisor, testified that he attended four management meetings, the first in late December 1993. At that meeting, Service Center Manager Daniel told the supervisors to join groups of employees outside the facility, and to break them up. The Company wanted to make sure that employees were not talking together outside the facility. The supervisors were to document all infractions and make sure that the employees were not passing out union cards at the facility. Daniel said that if anybody was involved with the Union they might as well look for another job because they would not be at the Company's facility.

It was after this meeting in December that Calvo joined the union movement. Bennett attended another management meeting a few days later, attended by supervisors and attorneys. Somebody asked whether the supervisors could identify prounion employees. Two names, including Calvo's, were mentioned. At this or a later meeting, Daniel said that after ''this thing is over,'' the Company was going to ''go after'' Calvo, according to Bennett.

Although Daniel in general terms denied some of the statements attributed to him, he did not deny all of them. I credit the detailed and specific testimony of Respondent's former supervisors.

At the next meeting that Bennett attended, he was asked by an attorney to name the employees under his supervision, and to identify those whom he thought to be prounion.

Bennett further testified that a supervisor told him that the latter had the assignment of ''following'' Andrew Johnson, a union activist. Bennett further averred that he told this to Johnson.

Lori Welch was the manager of the Company's human resources division, and was an admitted supervisor. She attended several management meetings, and at one of them Calvo's involvement with the Union was discussed. Welch said that the supervisors were told that an employee had to do something wrong in his job, and that they could not terminate him for union activity.

According to Respondent, it held about 20 meetings with employees.[4]

The Union filed a representation petition in early February 1994, and an election was held on April 22. The Union lost.

B. *The Alleged Violations of Section 8(a)(1)*

1. The alleged threat to discharge Duroseau

Duroseau was a union organizer. He testified that, in mid-February, Steven Dechert (an admitted supervisor) told him that somebody had told Dechert that Duroseau was ''involved with the Union.'' Dechert continued that, if the Union did not ''pass through,'' he was going to kick Duroseau out by the gate and fire him. Duroseau's testimony is uncontradicted and credited.

This was an obvious threat to discharge an employee because of his union activity and violated Section 8(a)(1).

2. The alleged impression of surveillance

The earliest act of unlawful interference alleged in the complaint took place in late January, according to Calvo. He was then called into Daniel's office, in the presence of Wendy Steel and John Haligowski, admitted supervisors.

The background to this meeting was a report to the Company by another employee, Hatm Muhammad. He stated that Calvo came up behind him on the highway, blinked his lights, and caused Muhammad to pull over and stop. Thereafter, according to Muhammad, Calvo solicited him to sign a union card, and Muhammad later reported this to the Company.

Calvo denied this version. He heard a strange noise in his car, and stopped to investigate. Another car stopped, then Muhammad. The latter asked what happened, Calvo explained, and the two parted.

The interview was the first time Calvo had been called into such a matter. According to Calvo, Daniel asked him to explain an ''incident'' on the highway involving ''blinking lights.'' Calvo replied that he did not know what Daniel was talking about. Wendy Steel said that Daniel was interested in the Company's ''problems.''

''Does this have anything to do with the Union?'' Calvo asked Daniel. ''Well, you tell me,'' Daniel said. ''No, you

[2] The pleadings establish that Daniel was a supervisor and an agent.

[3] The Company's list of evidence of union activity includes: (1) small groups of employees gathering in unusual places; (2) the ''grapevine'' becoming dead; (3) former employees show up and talk to employees; (4) employees become ''busy'' during break periods, instead of relaxing; (5) new groups of employees form; (6) employee conversation dries up when a supervisor approaches; (7) an increase in employee questions about company policies and benefits; (8) employees present complaints in a militant manner; and (9) previously friendly employees become sullen and uncommunicative; there are numerous other ''signs'' of union activity, and the supervisors are instructed to learn them ''cold.'' G.C. Exh. 13.

[4] R. Br. 3.

tell me,'' Calvo responded. ''You call me here.'' Calvo added that if the interview had anything to do with the Union, he wanted to read something from a ''little paper,'' and stated that he intended to file a complaint with the Board as soon as he left the meeting.[5] Calvo added that he had simply been doing his job 100 percent. At this point, Supervisor Haligowski said, ''If you've been doing your job one hundred percent, I'm going to make sure that I do my job one hundred percent.''

As noted, the complaint alleges that Respondent created the impression that its employees' union activities were under surveillance. The General Counsel argues that Haligowski's statement conveyed the impression that he intended to monitor Calvo's activities during working time because the latter was engaged in union activities.[6]

The dialogue between Daniel and Calvo clearly shows Respondent's interest in whether the ''incident'' involved union activities. Haligowski's statement could reasonably be interpreted to mean that the Company believed that union activities were involved. The supervisor's statement in response to Calvo, that he intended to do his own job 100 percent, had no meaning apart from a declaration of intention to monitor Calvo's union activities. It certainly had nothing to do with Calvo's work performance, as this was not a subject under discussion.

I therefore conclude that Haligowski's statement expressed an intention to monitor Calvo's union activities. Although the statement verbalized a threat rather than ongoing activity, it was within the ambit of the complaint allegation, and I conclude that it violated Section 8(a)(1).

3. The first alleged threat to discharge Calvo and the no-solicitation rule

(a) *Summary of the evidence*

Calvo went to the plant on Friday during the first week of February 1984, to pick up his paycheck. He parked his car in the parking lot and talked to employees about the Union and other matters. Supervisor Haligowski was sitting in his own car, ''hiding there,'' according to Calvo. After a short time, Calvo moved his car to another location, Branch Manager Daniel came running after him and knocked on his car. Calvo opened the window, and Daniel said, ''You remember the 'little paper' that you read? Now you can call your lawyer.''

Later in the week, according to Calvo, Daniel called him into his office, and made a number of statements that he did not want to see Calvo talking with other employees during working hours; that he did not want to see Calvo talking with employees in the company parking lot; and that he did not want to see Calvo talking with anybody.

On cross-examination, Daniel contended that he merely repeated company rules to Calvo in the parking lot. Daniel was asked whether employees could talk about various subjects, and said that they could. Asked whether they could talk about the Union, Daniel distinguished ''talking about'' from ''soliciting for'' the Union, and, after repeated questioning, testified that employees could talk about the Union on working time. However, Daniel also agreed that his pretrial affidavit affirms that he told Calvo several times that he did not want Calvo to talk about the Union during working time. At the hearing, Daniel denied that he said this to Calvo. He then affirmed that his affidavit states that he allowed Calvo the right to talk about anything during break periods. Asked again whether he told Calvo that he could not talk about the Union, Daniel returned to his original distinction between ''talking'' and ''soliciting''—Calvo could not ''recruit'' for the Union.

(b) *Factual and legal conclusions*

Daniel's contradictions and equivocations are those of unreliable witness. I find that on the Friday following Calvo's visit to the parking lot, Daniel told him he did not want Calvo talking with other employees during working hours or in the parking lot, or with other employees at any time. Daniel further admitted that he had no rule against employees talking about other subjects, but that Calvo could not ''recruit'' for the Union at any time. Calvo's testimony is consistent with company policy as explicated by former Supervisor Bennett.

I conclude that Respondent promulgated a rule prohibiting Calvo from discussing the Union with other employees at any time, but permitted employees to discuss other subjects. This was unlawful under established Board precedent. *Angelica Health Care Services Group*, 284 NLRB 844 (1987). Bennett's version—that talk about the Union was prohibited during ''working hours''—was equally unlawful. *Borun Bros.*, 257 NLRB 156 (1981); *Essex International*, 211 NLRB 749 (1974).

Daniel's statement to Calvo in the parking lot, that the latter could call his lawyer ''now,'' was made after Calvo had talked to other employees. Daniel's statement could reasonably have been interpreted to mean that the Company intended to take action against Calvo that would require the latter to obtain legal assistance. This could only have meant discharge or other adverse action. I find that, by making this statement, Daniel violated Section 8(a)(1).

4. Additional alleged threats of discharge or unspecified reprisals against Calvo

(a) *The facts*

Calvo was a union observer at the election held on April 22. He testified that, after it became apparent that the Union had lost, Daniel came up to him, thrust his face a few inches from Calvo's, and said, ''You're a f__king loser.'' Daniel agreed that he spoke to Calvo, but asserted that he merely said, ''You lost.''

Calvo's practice was to go in on Friday's, when he did not work, and pick up his paycheck from the switchboard operator. If she did not have it, he would go to Daniel's secretary. On the Friday following the election, neither the switchboard operator nor Calvo's supervisor had the paycheck. Calvo went to Daniel's secretary, who told him to go into Daniel's office. He did so. Daniel held up his check and asked, ''Why do you want this check?'' ''I work for money,'' Calvo replied, ''and that's my check.''

Daniel replied, ''Wait till you go to Pepsi-Cola to ask for a check.'' Calvo responded that he worked for Coca-Cola, and Daniel responded, ''Well, you should go there and ask for a check. They're your brothers.''

[5] As noted, Calvo filed a charge on February 9.

[6] G.C. Br. 5.

(b) *Legal conclusions*

Daniel's statement to Calvo after the election merely conveyed the obvious fact that the Union had lost. Calling Calvo a ''loser,'' with or without the expletive, may be construed to mean that Daniel considered Calvo to be an ineffective union representative. However, this is insufficient to set aside an election. *Swingline Co.*, 256 NLRB 704, 715 (1981). I reach the same conclusion with respect to the complaint allegation that the statement constituted unlawful interference, and shall recommend that this allegation be dismissed.

The statements made by Daniel in connection with the paycheck require a different conclusion. Daniel's statement that Calvo should go to another employer and ask for a check implies that Calvo's employment with Respondent was coming to an end. In fact, it did. I conclude that the statement constituted unlawful interference.[7]

C. *The Alleged Discriminatory Warnings*

1. General principles

The General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[8]

2. The warning for the alleged failure to report for work

(a) *Summary of the evidence*

On March 9, Respondent, through Paul Clifford (an admitted supervisor), issued the following warning to Calvo asserting that he was ''AWOL'' on March 5. The warning reads:

> All merchandisers were told to check the weekly schedule due to vacations. Rico (Calvo) normally had Friday's and Saturday's off, but due to the shortfall Rico only had Friday off. Rico did not look at the schedule therefore was AWOL.[9]

Calvo testified that he had Friday's and Saturday's off for several months. This is confirmed by the warning itself. Calvo further testified that he checked the schedule every day, and did so on the Thursday preceding March 5. There was no change Calvo had to do this, he affirmed, because he had a ''swing shift,'' and his route constantly changed.

When Clifford gave Calvo the warning, Calvo asked to see the schedule. It had originally been typed, but it was changed in pen or pencil, with Calvo assigned for Saturday.

Clifford then took Calvo to a conference room and said, ''Rico I respect your beliefs.'' ''I'm just doing my job. Paul Daniel told me to do it. He knew that you didn't work that day.''

Clifford testified that the schedule was posted biweekly in his office, and that he made a change in it to take effect the first week of February. He could not recall the exact date that he made the change. Clifford also stated that he told Calvo about it, but could not remember the date.

Respondent contends that Calvo was at a meeting in which Clifford discussed the change.[10] Calvo was asked whether he was present, and responded, ''No. I don't know.'' He asked Clifford whether the latter had seen him at the meeting, and the supervisor said he was not sure.

(b) *Factual analysis*

Calvo gave a logical reason to support his testimony that he checked the schedule every day he was a ''swing'' driver with changing routes, and wanted to know where his next route would take him. His testimony that the schedule was unchanged on the Thursday preceding his Saturday day of ''AWOL'' could only be controverted by credible evidence that it had been changed prior to that date. There is no such evidence in Clifford's assertions. Calvo's testimony that the schedule had been typed, and changed by hand is not contradicted by Clifford. Further, Calvo's testimony that Clifford told him that Daniel asked Clifford to do it because the former know that Calvo did not work on Saturday, is uncontradicted, and credited. Although Respondent contends that Calvo was present at a meeting discussing the change, or that Clifford notified him, the evidence recited above is insufficient to establish this.

I conclude that Respondent did not change the schedule prior to March 5, and that Daniel told Clifford to change the schedule after March 3, and to issue the warning to Calvo.

3. The warning for alleged ''harassment''

On March 14, Respondent issued a warning to Calvo that asserts misconduct of ''threatening, assaulting, fighting with or harassing employees or customers.'' It reads in part:

> Employee has been reported to have harassed coworkers including threats and inappropriate physical contact—this will not be tolerated. ''Witness (if any): coworkers.''[11]

Respondent argues that Calvo's first misconduct consisted of the ''blinking light'' incident discussed above,[12] when Calvo assertedly caused Hatm Muhammad to stop on an access road, and solicited him to join the Union. Calvo denied that he ever caused another driver to pull off a road by blinking lights.

In a second incident Calvo allegedly threatened Muhammad, told him that Hispanic persons should stick together, bumped or pushed his shoulder, and grabbed his arm.[13]

Supervisor Daniel testified that Muhammad reported the second incident about a month and a half after the ''blinking light'' incident, which took place in late January. In Muhammad's pretrial affidavit, however, he contends that the

[7] This incident forms the factual basis for the allegation that the withholding of the check constituted unlawful discrimination. This allegation is considered, infra.

[8] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 465 U.S. 393 (1983).

[9] G.C. Exh. 2(d).

[10] R. Br. 7.

[11] G.C. Exh. 2(e).

[12] Supra.

[13] R. Br. 14.

blinking light incident occurred on April 1, and the second incident the next day. Muhammad also gave other dates for other encounters with Calvo.

Calvo testified that he was called into a meeting on March 14 with Supervisors Daniel and Welch and was handed the warning quoted above. Calvo asked who the employees were that had made accusations against him. He testified, corroborated by Daniel, that the Company refused to give him any names. Former Supervisor Bennett testified that he had never given a warning to an employee for harassing another employee.

I do not credit the contradictory testimony of Daniel and Muhammad, and conclude that the Company did not provide Calvo with the name or names of his accusers.

4. The withholding of Calvo's paycheck

Respondent's action in compelling Calvo to go to Daniel for his paycheck on the Friday following the election was obviously discriminatory.

5. Other evidence of animus

Former Supervisor Bennett testified that, prior to the advent of the union campaign, he had total discretion in the issuance of warnings. When the union drive began, however, Service Center Manager Daniel instructed the supervisors to ''document'' everything that went on. Prior to this time, Bennett had never issued a warning.

Calvo testified without contradiction that he received no warnings prior to the union campaign. On December 15, 1993, Supervisor Tommy Waite issued a warning to Calvo for violation of a safety rule, and another one the next day, December 16, for ''unsatisfactory performance.'' On December 28, Waite issued Calvo a warning for an unexcused absence.[14]

Calvo testified that Waite told him that ''they'' told Waite to give Calvo the warnings, but that Waite was going to ''hide'' them. Human Resources Manager Welch did not sign off on the first two warnings until January 15, and the third on January 28.[15] As noted above, it was in late December 1993 after a speech by Daniel, that Calvo joined the union movement.

6. Legal conclusions

The evidence establishes Calvo's participation in the union campaign, Respondent's knowledge of this fact, and its animus against union organizers in general and Calvo in particular. The facts in the first warning show that Supervisor Clifford did not change the printed schedule prior to Calvo's Saturday day off, and that Clifford told Calvo that Daniel told Clifford to issue the warning because Daniel knew that Calvo had Saturday off. This constitutes explicit evidence of discriminatory motivation.

With respect to the second warning, Respondent's evidence is contradictory, and its failure to inform Calvo of the person or persons who made the charges against him made it impossible for Calvo to defend himself, and constituted additional evidence of unlawful motivation.

The fact that Supervisor Waite told Calvo that ''they'' told Waite to issue the December 1993 warnings the first that Calvo had received—at about the time that the Company learned of the union campaign, constitutes additional evidence. A month later, when Human Resources Manager Welch signed the warnings, Respondent was certain about Calvo's role in the campaign, and Daniel stated at a management meeting that the Company was going to ''go after'' Calvo after the union matter was over.

I conclude that the General Counsel has established a strong prima facie case that the two warnings alleged in the complaint were discriminatorily motivated, and that the Company has not demonstrated that it would have issued the warnings in any event. I therefore find that, by doing so, Respondent violated Section 8(a)(3) and (1) of the Act.

Respondent's action in compelling Calvo to go to Daniel for his paycheck on the Friday following the election was also violative of Section 8(a)(3) and (1).

D. *The Suspension and the Discharge*

1. The Company's method of distribution

Respondent utilized account representatives, bulk drivers, and merchandisers to distributes its products to the stores. The account representatives took the orders, and the bulk drivers delivered them, and placed them in a designated location in the store, usually in the backroom. The merchandisers then placed the merchandise on the shelves.

Some merchandisers had regular routes, and others were ''swing'' drivers, with routes that changed. Calvo was a ''swing'' merchandiser. They were supervised by a merchandising supervisor. The merchandisers picked up their vehicles at the Company's Hollywood location, and drove to their routes in a manner that brought them there after the bulk driver had made a delivery. Some large stores had to be serviced twice daily.

The merchandisers reported their servicing of a store on a merchandising report. This was a document on which the merchandiser was supposed to list his activity for the day—names of the stores, the arrival and departure times, the amount of products displayed, and other information. The document had a column labeled ''Store Manager,'' where store personnel put their signatures or initials indicating that the store had been serviced. There is evidence in the record of merchandising reports that are not filled out accurately or completely.[16] One of Respondent's asserted reasons for disciplining Calvo is based in part on alleged inaccuracies on a merchandising report.

2. The events of June 15 to July 1, 1984

(a) *Summary of the evidence*

Calvo arrived at the plant at the starting time of 6 a.m. on June 15. He was assigned to service five stores on that day. Because he was a ''swing'' driver, he was given a map of the route. Calvo could not find the vehicle originally assigned to him, obtained another, and was a few minutes late starting out.

Calvo's first stop was Publix Market No. 292 in Boca Raton, a large store. Calvo serviced this store, then Publix

[14] G.C. Exhs. 2(a), (b), and (c).

[15] Id.

[16] G.C. Exhs. 14, 15, and 20–23

Market No. 324, and Winn Dixie Stores 360 and 355. All of these deliveries are evidenced by a stamp of the respective store on the merchandise report, and an initial in the right-hand column.[17] Calvo testified that clerks frequently initial the merchandise reports if the manager is not available.

Calvo noted that his gas was low. His next stop was a Wal-Mart store near his last stop. Calvo was concerned about finishing the route, which was unfamiliar to him. He called the Wal-Mart store, and learned that the bulk delivery driver had not yet been there. Calvo then called the company office, and obtained the beeper number of the driver. He called the driver, and obtained the latter's promise to call Calvo as soon as the products were delivered.

Calvo then returned to a Mobil fuel pump located at the Company's Hollywood plant. He was there at 12:12 p.m., according to a report from Mobil.[18] While filling his tank, Calvo was beeped by the bulk driver, who notified him that delivery had been made. The Wal-Mart store records and the testimony of its receiving manager show that the delivery was made at about 12:21 p.m.[19]

The remaining two stops on Calvo's route were the Wal-Mart store, and the Publix 292 store for a second visit. According to Calvo, he did not complete filling his tank on receipt of the call from the bulk driver, and left immediately for the Wal-Mart store in order to avoid being late. Because of his unfamiliarity with the territory, he passed the Publix 292 store first and serviced it. He then went to the Wal-Mart store, and merchandised a small order.

Calvo's merchandise report states that he arrived at the Publix 292 store for the second time at 12:10 p.m. and left at 1 p.m.; that he arrived at the Wal-Mart store at 1:10 p.m. and left at 2 p.m.[20] Opposite the merchandise report for the Wal-Mart store appears the signature of ''Rosemary Golis.'' Rosemary Golis was called as a witness by Respondent, and identified the signature as hers. She explained that she was working on the service counter and had authority to sign merchandising reports when authorized by the store manager.

In the signature block for the Publix 292 store is an initial that appears to be a ''C.'' Calvo could not identify the person who made this initial. At the bottom of the merchandising report there are two stamps showing Publix 292 store, and one for Publix 324 store. All three stamps are side by side at the bottom of the report.[21]

When Calvo returned to the plant after servicing the stores, he estimated the times indicated on the merchandise report, and clocked out at 2:45 p.m.

Sales Manager Frank Clifford and Supervisor Kris Kroon were working at a cold vault across the street from the fuel pump. Kroon saw Calvo at the pump at about noon, and reported this to Clifford. Clifford stated his belief that Calvo could not have serviced the last two Boca Raton stores. Late in the afternoon, he reported this to Service Center Manager Daniel, who told him to call the Mobil fuel company office in Louisiana and ask for the sales records of that day.

Clifford testified that he had a voice mail message left at about 2:35 p.m. from Glen McDade, assistant service manager of Publix 292 store, asserting a service problem at the store, and that Clifford returned the call. McDade was called as a witness by Respondent, but did not recall any service problem with respect to Respondent's product on June 15. McDade testified that he did not put the store stamp on a merchandise report twice for the same delivery, and did not know of any store personnel who did so. Although McDade did not recognize the initial appearing on the merchandise report the second time, he could not recognize the initials on numerous merchandise reports shown to him.

Frank Koenig was the account manager for Publix 292 store. He testified on direct examination that he was beeped by Publix store 292 on the afternoon of June 15, went to the store, and observed that the shelves for the Company's product were only partially full, although there was a delivery in the back. On cross-examination, Koenig recalled that the day was a Wednesday, but could not recall whether it was in June or another month.

Patrick Henry was the account manager for the Wal-Mart store. He testified that he walked into that store on June 15, and observed that Respondent's product had not been merchandised. However, Henry also testified that he went into the Wal-Mart store on Mondays, Tuesdays, and Thursdays, but not on Wednesdays. As indicated, June 15, 1994, the day in question, was a Wednesday.

The next day, June 16, Clifford informed Human Resources Manager Lori Welch about Calvo's presence at the fuel pump at about noon. She also told Clifford to get the documents from the Mobil office.

Service Manager Daniel testified that he saw Calvo's June 15 merchandising report on the following day, June 16. From the fact that the Publix 292 stamp appeared twice, Daniel concluded that Calvo had serviced it twice, and had then come down to the Mobil fuel pump. Daniel did not call either of Calvo's last two stops to determine whether they had been serviced the prior day and conceded that he had not received any complains about Calvo.

The Mobil report arrived on June 29, and Calvo was called the next day to an interview with Daniel, Clifford, and Employee Relations Manager Gail Beatty. Daniel said that Calvo's merchandise report was inconsistent with the Mobil report, since Calvo could not have been at both the Publix account in Boca Raton and the fuel pump in Hollywood at about noon. Calvo acknowledged that the times on the merchandise report were erroneous, but stated that he had in fact serviced the last two stores. At one point, Daniel apparently believed that Calvo had serviced the last two stores, but wanted to know what Calvo did until his checkout time of 2:45 p.m. When Calvo explained that he returned to Boca after fueling his vehicle, Daniel asked the reason. He then contended that it would have been impossible for Calvo to have traveled to the last two stops and to have returned by 2:45 p.m. In response to Daniel's questions, Calvo told him that he had traveled the Turnpike between Hollywood and Boca Raton, Daniel told Calvo that he was going to travel the same route to test the accuracy of Calvo's report. In the meantime, Calvo was suspended.

Daniel testified that he went from Hollywood to the Publix 292 store in Boca Raton that afternoon, that it was a 35-mile trip, and that it took him 43 minutes to arrive at the store, using the Turnpike. He did not go to the nearby Wal-Mart store, and did not go into either store to inquire whether they had any recent merchandising problems. On the basis of his

[17] G.C. Exh. 6.
[18] CPX Exh. 1.
[19] G.C. Exh. 24; testimony of Receiving Manager Burns Rader.
[20] G.C. Exh. 6.
[21] Id.

trip data, Daniel concluded that Calvo could not have made the round trip and serviced the two accounts between about 12:30 and 2:45 p.m., his checkout time.

On the next day, Daniel called Calvo into his office and said that Daniel had driven the route and that it took 45 minutes. Accordingly, Calvo could not have driven back to Boca Raton and serviced the stops. Calvo replied that he drove faster than Daniel, and that it took him 25 minutes to make the trip. Daniel replied that Calvo was violating the Company's policy about observing the speed limits. He told Calvo that he was discharged.

Human Resources Manager Welch participated in the decision and approved of it. She relied entirely on documents supplied to her by management personnel. Welch gave a variety of reasons for her decision. First, called as a witness by the General Counsel, she stated her belief that Calvo had serviced all of his accounts on June 15. In a pretrial affidavit in September 1984, about 3 months after the discharge, Welch said it was her opinion that Calvo had finished all his routes by about noon, and was unaccounted for until his clockout time of 2:45 p.m. He was discharged because he ''falsified'' documents. Asked why she obtained the Mobil report, Welch replied, ''Because of Mr. Calvo's high Union profile, and the fact that he told us he had an attorney, we wanted something in black and white that told us where he was.'' Welch did not believe that he had ''gone back to Boca.'' She did not call any of Calvo's accounts for June 15 to determine whether they had any merchandising problems.

Former Supervisor Kroon testified that after Calvo's discharge, Daniel held a management meeting and said that Calvo had ''finally been caught.''

(b) *Factual and legal conclusions*

The first problem is to ascertain Respondent's position. Does it contend that Calvo did finish his stops by about 12:15 p.m., wrote down erroneous times for the last two stops, and was unaccounted for until 2:45 p.m.? Or does it assert that he did not service the last two stops, and falsified his merchandise report to indicate that he had done so?

There is evidence to support an inference that, during the hearing, the Company took both positions. Respondent's brief asserts the latter contention. The Company first distinguishes a ''mistake'' from ''falsification.'' It then states:

> There is ample evidence in the record that merchandisers frequently made errors on their merchandising reports regarding the times that they arrived and left particular accounts but they were unintentional. Moreover, there was evidence that merchandisers also on occasion simply failed to enter any times at all in their merchandising reports. Respondent does not dispute this.[22]

This was not, however, the nature of Calvo's misconduct, according to Respondent. He ''intentionally and deliberately wrote down the times for which he claimed he merchandised Wal-Mart and Publix 292 on June 15, 1994, when in fact he had not.''[23] In support of this position, Respondent cites the reports of Account Executives Koenig and Henry, and the fact that the fuel pump records show that Calvo was there at about the same time he said he was at the Publix 292 store.[24]

The evidence cited by Respondent must be weighed against that elicited by the General Counsel. Koenig's testimony is not persuasive because he could not remember the month that he assertedly saw the condition in the Publix store. Clifford's testimony about a voice mail complaint from Assistant Store Manager McDade is hearsay, and McDade himself did not remember any such incident.

Weighed against this evidence is the indisputable fact that the Publix 292 stamp appears twice on the merchandise report, while Assistant Store Manager McDade testified that the report is not stamped twice for the same delivery. Although the person who initialed the second merchandising activity could not be identified, the second stamp on the report constitutes documentary evidence corroborating Calvo's testimony that he did service the store a second time on June 15. Daniel testified that he reached the same conclusion when he saw the report.

As for the Wal-Mart store, the person who signed the report, Rosemary Golis, appeared and identified her signature. This constitutes evidence supporting Calvo's position that he serviced the Wal-Mart store. Account Executive Patrick Henry did not even go into the store on Wednesdays, the day in question.

Daniel's travel data is insufficient to offset the weight of Calvo's testimony supported by documentary evidence. As noted, Calvo contested Daniel's assertion that it took 45 minutes to drive from Hollywood to the stores in Boca Raton. The issue is not whether Calvo was violating the speed limit, as suggested by Daniel, but how long it actually took him. According to Calvo, it took 25 minutes one way, or just under an hour for a round trip. According to Daniel, it took about 45 minutes one way, or just about an hour-and-a-half for a round trip. Assuming that Calvo departed Hollywood about 12:30 p.m. and was back at 2:45 p.m., a span of 2 hours and 15 minutes, there were either 45 minutes or 1 hour and 15 minutes to service the two stores, depending on which travel time assessment is utilized. Although this is not a particularly large window of time, the evidence is insufficient to establish that it was impossible. The stores were near each other. Measured against the indisputable documentary evidence that Calvo serviced the last two stops, Respondent's travel time arguments are not persuasive. I conclude that Calvo in fact did service the last two stops on June 15.

The evidence is overwhelming that Respondent's motivation in suspending and firing Calvo was discriminatory in nature. During a management meeting, Service Center Manager Daniel said that the Company was going to ''go after'' Calvo when the union matter was over. And, when it was over and Calvo was discharged, Daniel told supervisors that the Company had ''finally caught'' him. Welch referred to Calvo's ''high Union profile.'' An inference of unlawful motivation is further supported by the acts of interference against Calvo cited above.

In addition, neither Daniel nor Welch called either of the stores to determine whether Calvo had serviced them. Calvo was not called to correct his alleged deficiencies. Daniel made a trip up to Boca Raton, and was at the Publix 292 store, but never bothered to go inside and make an inquiry.

[22] R. Br. 21.
[23] Id.
[24] Id. at 23.

This constitutes failure to conduct a complete and fair investigation, and is evidence of discriminatory motivation under established Board law. Daniel's own testimony shows that he did not believe the charge against Calvo. Respondent's shifting positions during this proceeding constitute additional evidence of unlawful purpose.

I conclude that Respondent suspended Calvo on June 30, 1994, and discharged him on July 1, because of his union activities and sympathies, in violation of Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Florida Coca-Cola Bottling Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following acts and conduct, Respondent violated Section 8(a)(1) of the Act:

(a) Threatening to discharge employees because of their union activity.

(b) Threatening to engage in surveillance of its employees' union activities.

(c) Threatening to discharge or take other unspecified reprisals against employees in retaliation for their union activities.

(d) Promulgating an overly broad and unlawful rule prohibiting discussion of the Union among its employees.

4. By engaging in the following acts and conduct, Respondent violated Section 8(a)(3) and (1) of the Act:

(a) Issuing warnings to employee Rigoberto Calvo on March 9, and 14, 1994, because of his union sympathies and activities.

(b) Withholding Calvo's paycheck in late April 1994, because of his union sympathies and activities.

(c) Suspending Calvo on June 30, 1994, and discharging him on July 1, 1994, because of his union sympathies and activities.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as herein specified.

REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully issued warnings to Calvo on March 9 and 14, 1994, withheld his paycheck in late April 1994, suspended him on June 30, 1994, and discharged him on July 1, 1994, it is recommended that Respondent be ordered to offer him reinstatement to his former position, without prejudice to his seniority or other rights and privileges or, if any such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill such position, and to make him whole for any loss of earnings he may have suffered because of Respondent's unlawful conduct by paying him a sum of money equal to the amount he would have earned from the date of his unlawful suspension and discharge to the date of an offer of reinstatement, less net earnings during such period to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[25]

I shall also recommend that Calvo's warnings on March 9 and 14, 1994, his suspension on June 30, and his discharge on July 1, be removed from Respondent's records, and that Respondent be required to notify Calvo in writing that this has been done, and that such actions will not be relied on as a basis for future discipline of Calvo. I shall further recommend that Respondent be required to tell Calvo in writing that future paychecks will not be withheld.

Further, I shall recommend Respondent be required to rescind its unlawful order prohibiting employee discussion of the Union, and incorporate the rescission in a notice, to be posted.

On the foregoing findings of fact and conclusions of law and the entire record I recommend the following[26]

ORDER

The Respondent, Florida Coca-Cola Bottling Company, Inc., Hollywood, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees because of their union activity.

(b) Threatening to engage in surveillance of its employees' union activities.

(c) Threatening to discharge or take other unspecified reprisals against employees for engaging in union activities.

(d) Promulgating or enforcing an overly broad rule prohibiting its employees' discussion of the Union.

(e) Discouraging membership in United Steelworkers of America, AFL–CIO, CLC, or any other labor organization, by discharging or otherwise disciplining employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(f) Withholding its employees' paychecks because of their union activities.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rigoberto Calvo reinstatement to his former position or, if any such position no longer exists, to a substantially equivalent position, dismissing if necessary any em-

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[25] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1956 amendment 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ployee hired to fill the position, and make him whole for any loss of earnings he may suffered by reason of Respondent's unlawful suspension and discharge of him in the manner described in the remedy section of this decision.

(b) Remove from its records all references to its unlawful warnings issued to Calvo on March 9 and 14, 1994, its suspension of him on June 30, and its discharge of Calvo on July 1, 1994, and notify him in writing that this has been done, and that such discipline shall not form the basis for any future discipline of him. Respondent shall also inform Calvo in writing that it will not withhold any future paycheck lawfully due him. Further, Respondent shall rescind its overly broad and unlawful rule prohibiting discussion about the Union by its employees.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at Hollywood, Florida, copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge employees because of their union activity.

WE WILL NOT threaten to engage in surveillance of our employees' union activities.

WE WILL NOT threaten to discharge or take unspecified reprisals against our employees because of their union activities.

WE WILL NOT promulgate or enforce an overly broad and unlawful rule prohibiting our employees' rights to discuss the Union.

WE WILL NOT discourage membership in the United Steelworkers of America, AFL–CIO, CLC, or any other labor organization, by discharging or otherwise discriminating against employees because of union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

WE WILL NOT withhold paychecks from our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Rigoberto Calvo reinstatement to his former job, and make him whole with interest, for any loss of earnings he may have suffered because of our unlawful suspension and discharge of him.

WE WILL remove from our records all references to our unlawful warnings issued to Calvo on March 9 and 14, 1994, our suspension of him on June 30, and his discharge on July 1, 1994, and notify him in writing this has been done and that such actions will not be used to justify further discipline of him.

WE WILL rescind our overly broad and unlawful rule prohibiting discussion of the Union by our employees.

FLORIDA COCA-COLA BOTTLING COMPANY, INC.